A

SATHIYASEELAN NADESAN

v.

LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA

B

HIGH COURT MALAYA, ALOR SETAR
HO MOOI CHING J
[CIVIL SUIT NO: 12A-88-2009]
11 JUNE 2010

C ***CIVIL PROCEDURE:*** *Summary judgment - Appeal against - Appellant jointly and severally liable for contributions due and payable to Employees Provident Fund - Section 65 Employees Provident Fund Act 1991 did not override s. 6(1)(d) Limitation Act 1953 - Appellant entitled to rely on limitation as a defence - Employees Provident Fund Act 1991,*
D *s. 65(1) - Limitation Act 1953, s. 6(1)*

LABOUR LAW: *Provident Fund - Contributions - Appellant jointly and severally liable for contributions due and payable to Employees Provident Fund - Appeal against summary judgment - Section 65*
E *Employees Provident Fund Act 1991 did not override s. 6(1)(d) Limitation Act 1953 - Appellant entitled to rely on limitation as a defence - Employees Provident Fund Act 1991, s. 65(1) - Limitation Act 1953, s. 6(1)*

This was an appeal by the appellant against the Sessions Court
F judge's decision entering summary judgment against him jointly and severally with Gloss Technology (M) Sdn Bhd ('D1') for contributions due and payable to the respondent. The appellant conceded that by virtue of s. 46 of the Employees Provident Fund Act 1991 ('EPF Act') he was jointly and severally liable with D1
G and the other directors for the pertinent contributions, but relied on limitation as a defence. The sole issue was whether s. 65 of the EPF Act overrode s. 6(1)(d) of the Limitation Act 1953 ('LA'), thus precluding reliance on limitation as a defence. The respondent, relying on the High Court case of *Kekatong Sdn Bhd*
H *v. Bumiputra-Commerce Bank Bhd & Anor*, argued by way of analogy that s. 65 of the EPF Act operated to oust s. 6(1) of the LA.

I

Held (allowing the appeal, and setting aside the judgment against the appellant):

(1) Section 65(1) of the EPF Act does not make even the remotest reference to limitation but merely provides as to the manner of recovery of debt due to the respondent. There is clearly no conflict between that provision and s. 6(1) of the LA. As such, the rules of interpretation relied on by the High Court in *Kekatong (supra)* were not attracted and s. 65(1) of the EPF Act did not override s. 6(1)(d) of the LA. Based on the foregoing, limitation was a defence open to the appellant. *Kekatong Sdn Bhd v. Bumiputra-Commerce Bank Bhd & Anor* (dist). (paras 6-7)

[Case remitted for trial in the Sessions Court.]

Case(s) referred to:
Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***
Danaharta Urus Sdn Bhd v. KP Manufacturing Sdn Bhd & Ors [2008] 2 CLJ 191 HC ***(refd)***
Kekatong Sdn Bhd v. Bumiputra-Commerce Bank Bhd & Anor [2002] 7 CLJ 175 HC ***(dist)***
Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd [2003] 3 CLJ 378 CA ***(refd)***

Legislation referred to:
Employees Provident Fund Act 1991, ss. 46, 65
Limitation Act 1953, s. 6(1)(d)
Pengurusan Danaharta Nasional Bhd Act 1998, ss. 14(4)(k), 57(1), 72

For the appellant - G Balakrishnan; M/s Thomas Bala & Assocs
For the respondent - Nor Asma; T/n Sofiah Ariffin & Nor Asma

Reported by Suresh Nathan

JUDGMENT

Ho Mooi Ching J:

[1] Before this court, the appellant appealed against the decision of the learned Sessions Judge entering summary judgment against him jointly and severally with Gloss Technology (M) Sdn Bhd ('D1'), for the sum of RM73,693 being contributions due and

A payable to the respondent, the Employees Provident Fund ('EPF') Board for the period between July 1995 and November 1996. After considering the written submissions of both learned counsel, I allowed the appeal with agreed costs of RM2,000. The respondent now appeals.

B

[2] The appellant concedes that by virtue of s. 46 of the EPF Act, as one of the directors of D1 during the period in which contributions were liable to be paid, he is jointly and severally liable with D1 and the other directors for the contributions
C payable to the EPF to the account of the employees of D1 but relied on limitation as a defence. On the facts, the cause of action accrued in December 1996. The action was filed on 25 March 2004, that is, seven years nine months after its accrual. The sole issue before the court was whether s. 65 of the EPF Act
D overrode s. 6(1)(d) of the Limitation Act thus precluding reliance on limitation as a defence.

[3] For convenience, the two relevant provisions are set out below. Section 65(1) of the EPF Act reads:

E

> Notwithstanding the provisions of any other written law all contributions payable under this Act may, without prejudice to any other remedy, be recoverable by the Board summarily as a civil debt.

F Section 6(1) of the Limitation Act 1953 ('LA') provides:

> Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> G (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) Actions to recover any sum recoverable by virtue of any
> H written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

[4] Relying on the case of *Kekatong Sdn Bhd v. Bumiputra-commerce Bank Bhd & Anor* [2002] 7 CLJ 175, decided by Azmel
I J (as he then was) sitting as a High Court Judge, learned counsel for the respondent argued by way of analogy that s. 65 of the

EPF Act operated to oust s. 6(1) of the Limitation Act. In the *Kekatong* case, it was decided that the wording of s. 14(4)(k) and 57(1) of the Pengurusan Danaharta Nasional Bhd Act 1998 ('PDNBA') showed that it was clearly the intention of the legislature to allow those provisions to override the provisions of existing laws including the Limitation Act. Section 14(4) of the PDNBA reads:

> Without prejudice to sub-s. (1), (2) or (3) in relation to an asset vested in the Corporation:
>
> (k) no provision in any law or agreement limiting or prohibiting the right of the seller or requiring any consent to assign, sell, dispose or transfer such asset shall have any application or effect in respect of any acquisition or disposition by the Corporation, except that a disposition of such asset by the Corporation shall be subject to the approval of the relevant regulatory body or relevant State Authority having jurisdiction over such disposition.

Section 57 of the same Act provides as follows:

> (1) Notwithstanding any other law and in addition to any other power of the corporation may have under any contract or any other law, the Corporation or the acquiree as holder of any security whether as chargee, mortgagee, assignee lieu-holder or otherwise, over any property shall be entitled:
>
> (a) to dispose of such property or any part of such property by way of private treaty.

The learned judge held that there was a conflict between the provisions of the PDNBA and the LA, and consequently, the provisions of the former prevailed over those of the latter as:

(i) the provisions of the PDNBA were specific while those of the LA were general; and

(ii) the PDNBA came into effect later than the LA.

[5] Learned counsel for the respondent submitted that the High Court decision in the *Kekatong* case was confirmed by the Court of Appeal. In the Court of Appeal, the focus was primarily on the constitutionality of s. 72 of the PDNBA (see *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 CLJ 378). Nevertheless, I agree

with the view of Rohana Yusuf J in *Danaharta Urus Sdn Bhd v. KP Manufacturing Sdn Bhd & Ors* [2008] 2 CLJ 191, that the Court of Appeal had impliedly overruled the High Court on the limitation point. In his judgment, Gopal Sri Ram JCA (as he then was) referred to the two issues raised before the High Court, the first being whether the plaintiff was an 'obligor' within the meaning of the PDNBA and the second being whether the plaintiff's claim was barred by limitation. The Court of Appeal found, as conceded by learned counsel for the respondent in that case, that the second issue involved questions of fact, in particular, as to when the cause of action arose. It is obvious that had the Court of Appeal affirmed the High Court's decision on the point of limitation, such issues of fact would have been irrelevant. Although the Federal Court ultimately allowed the appeal against the Court of Appeal's decision (see *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701, the ruling on the limitation point remained undisturbed. Thus, the High Court's decision in the *Kekatong* case did not assist the respondent.

[6] In the instant case, s. 65(1) of the EPF Act makes not even the remotest reference to limitation but merely provides as to the manner of recovery of the debt due to the respondent. There is clearly no conflict between that provision and s. 6(1) of the LA. In the absence of any conflict, the rules of interpretation relied on by the High Court in the *Kekatong* case are not attracted and s. 65(1) of the EPF Act does not override s. 6(1)(d) of the LA.

[7] Based on the foregoing, I found that limitation was a defence open to the appellant and allowed the appeal. The judgment against the appellant was accordingly set aside and the case against him remitted for trial in the Sessions Court.